

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 4, 2002

IN RE:

APPLICATION OF EXCEL  
TELECOMMUNICATIONS, INC.  
TO AMEND ITS CERTIFICATE  
OF PUBLIC CONVENIENCE AND  
NECESSITY AS A COMPETING  
TELECOMMUNICATIONS SERVICE  
PROVIDER TO INCLUDE COMPETITIVE  
FACILITIES-BASED LOCAL EXCHANGE  
TELECOMMUNICATIONS SERVICES  
THROUGHOUT THE STATE OF  
TENNESSEE

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INITIAL ORDER GRANTING CERTIFICATE OF  
PUBLIC CONVENIENCE AND NECESSITY

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On August 6, 2002, this matter came before the Hearing Officer of the Tennessee Regulatory Authority ("Authority") upon the *Application of Excel Telecommunications, Inc. for a Certificate of Public Convenience and Necessity* ("Application"). The Application, which was filed on April 8, 2002, was made pursuant to Tenn. Code Ann. § 65-4-201 *et seq.*

LEGAL STANDARD FOR GRANTING CEN

The Application of Excel Telecommunications, Inc. ("Excel") was considered in light of the criteria for granting a certificate of public convenience and necessity ("CCN") as set forth in applicable statutes. Tenn. Code Ann. § 65-4-201 provides, in part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . . .

\* \* \*

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

\* \* \*

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.<sup>1</sup>

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<sup>1</sup> Notwithstanding the existence of subsection (d), the Federal Communications Commission ("FCC") has expressly preempted the Authority's enforcement of subsection (d) pursuant to the authority granted to the FCC under 47 U.S.C. § 253(d). See *In Re: AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Area*, FCC 99-100, FCC Memorandum Opinion and Order (May 27, 1999); FCC Memorandum Opinion and Order (January 8, 2001).

The Authority has since issued an order expanding a competing local exchange carrier's CCN to provide telecommunications services on a statewide basis including areas served by incumbent local exchange carriers with fewer than 100,000 total access lines in Tennessee. See *Order Approving Application of Level 3 Communications, L.L.C. to Amend Its Certificate of Public Convenience and Necessity*, Authority Docket No. 02-00230 (June 28, 2002).

Furthermore, pursuant to Tenn. Code Ann. § 65-5-212, a competing telecommunications provider is required to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

### INTERVENORS

Public notice of the Hearing in this matter was issued by the Hearing Officer on July 25, 2002, pursuant to Tenn. Code Ann. § 65-4-204. No interested persons sought intervention prior to or during the Hearing.

### EXCEL TELECOMMUNICATIONS, INC.'S HEARING

Excel's Application was uncontested. At the Hearing held on August 6, 2002, Excel was represented by H. LaDon Baltimore, Esq., of Farrar & Bates, L.L.P, 211 Seventh Avenue, North, Suite 420, Nashville, TN 37219. In addition, Mr. Joel Ballew, Director of Regulatory Affairs for Excel Communications, Inc., participated in the Hearing telephonically, presented testimony, and was subject to examination by the Hearing Officer. Upon Excel's conclusion of proof in its case, the Hearing Officer granted Excel's Application based upon the following findings of fact and conclusions of law:

#### **I. APPLICANT'S QUALIFICATIONS**

1. Excel is a corporation organized under the laws of Texas on December 6, 1988, and was qualified to transact business in Tennessee on August 25, 1995.

2. The complete street address of Excel's principal place of business is 8750 North Central Expressway, Suite 2000, Dallas, TX 75231. The phone number is (214) 863-8700 and fax number is (214) 863-9235. Excel's counsel is H. LaDon Baltimore, Esq., of Farrar & Bates, L.L.P, 211 Seventh Avenue, North, Suite 420, Nashville, TN 37219.

3. The Application and supporting documentary information existing in the record indicate that Excel has the requisite technical and managerial ability to provide facilities-based interexchange telecommunications services within the State of Tennessee. Specifically, Excel's senior management team possesses extensive business, technical, operational and regulatory telecommunications experience.

4. Excel has the necessary capital and financial ability to provide the services it proposes to offer.

5. Excel has represented that it will adhere to all applicable policies, rules and orders of the Authority.

## **II. PROPOSED SERVICES**

Excel requests authority to provide competitive facilities-based local exchange and resold telecommunications services in Tennessee. Excel currently holds authority to provide interexchange and resold local exchange telecommunications services in Tennessee.

## **III. PERMITTING COMPETITION TO SERVE THE PUBLIC CONVENIENCE AND NECESSITY**

Upon a review of the Application and the record in this matter, the Hearing Officer finds that approval of Excel's Application would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State and by fostering the development of an efficient technologically advanced statewide system of telecommunications services.

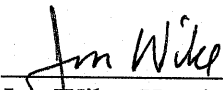
## **IV. SMALL AND MINORITY-OWNED TELECOMMUNICATIONS BUSINESS PARTICIPATION PLAN & BUSINESS ASSISTANCE PROGRAM**

1. Excel has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-212 and the Authority's Rules.

2. Excel has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-213.

**IT IS THEREFORE ORDERED THAT:**

1. The Application of Excel Telecommunications, Inc. is approved; and
2. Any party aggrieved with the Hearing Officer's decision in this matter may file a Petition for Reconsideration within fifteen (15) days from and after the date of this Order.

  
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Jon Wike, Hearing Officer